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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 638

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

Petitioner

vs.

GILMER S. MORRIS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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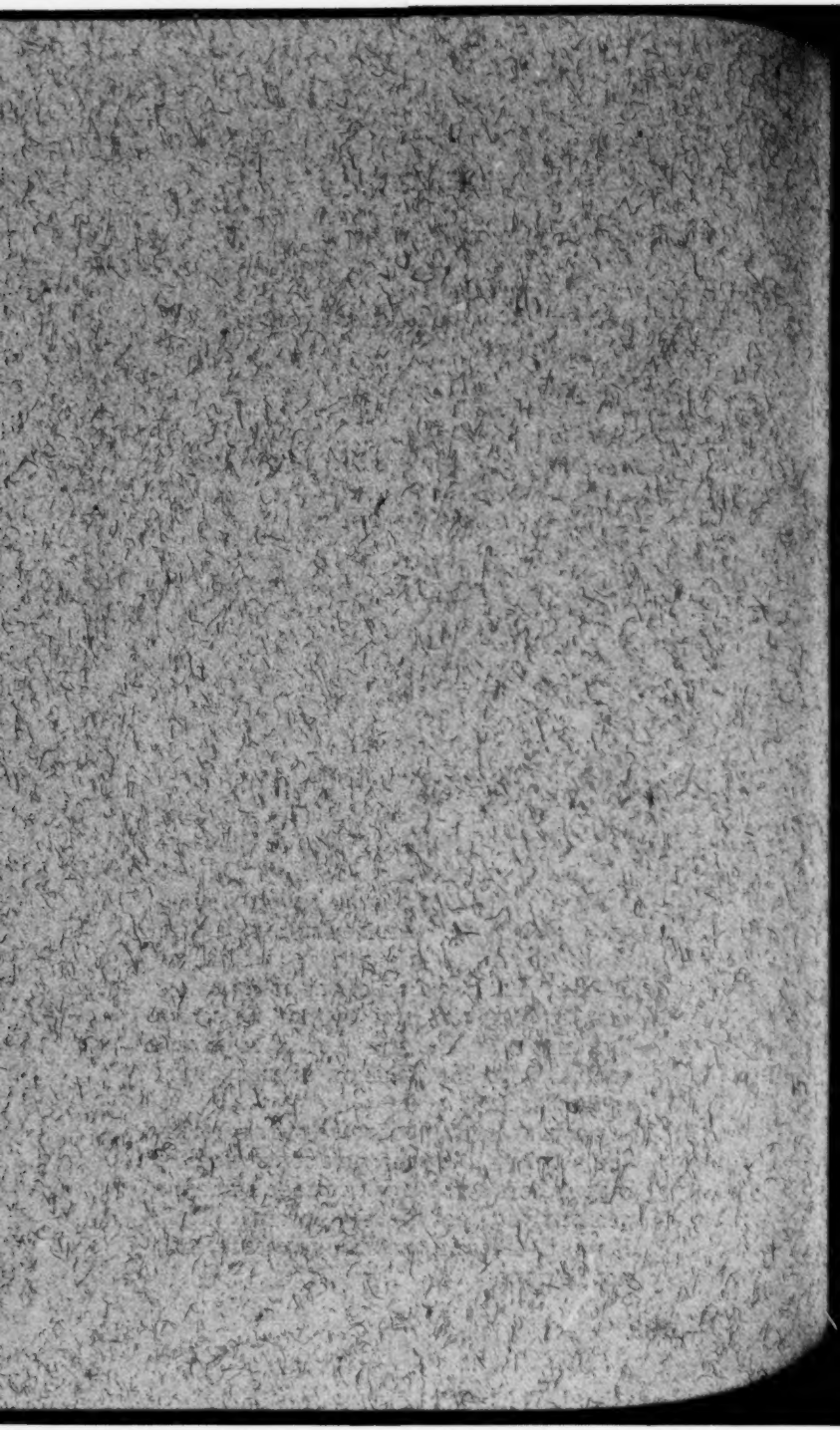

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MAY IT PLEASE THE COURT:

Petitioner, The Chesapeake and Ohio Railway Company, respectfully shows unto this Honorable Court that it is aggrieved by a final judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered on the 14th day of December, 1948, and the denial of its petition for a rehearing on the 10th day of January, 1949, in cause numbered 9565 on the docket of said Court, affirming a judgment of the District Court of the United States for the Northern District of Indiana, South Bend Division, ordering Petitioner to place the name of Respondent on its

seniority list of train dispatchers in the Peru territory before the name of H. B. Middlekauf and assign to him the seniority date on said list of June 3, 1945.

Summary Statement of the Matter Involved

The Proceedings

The case was brought under the Selective Training and Service Act of 1940, as amended, upon which the jurisdiction was based. In his amended complaint, respondent alleged his employment by the petitioner as a telegrapher on January 12, 1940, his continuation in such employment until his induction into the Navy on July 26, 1944, his honorable discharge from the Navy on May 15, 1946, the resumption of his employment with the petitioner as a telegrapher on June 6, 1946, his qualification for and promotion to the position of train dispatcher on July 31, 1946, and that the circumstances of the petitioner had not so changed as to make it impossible or unreasonable for him to be reinstated to a position of proper seniority and pay.

He further alleged that a contract between the petitioner and the telegraphers, providing that "when additional train dispatchers are needed, the positions will be advertised to all employees of the present telegraphers' seniority territory" gave him fixed rights to promotion to the position of a train dispatcher in conformity with his seniority, and that in addition to his rights under such contract he was entitled to the relief prayed for by virtue of a usage that all dispatchers were taken from the roster of telegraphers according to the highest seniority of the telegraphers.

He then alleged that while still in the the Navy, upon receipt of an advertised bid, he entered his bid for a dispatcher position, stating his approximate date of discharge, that the bid was accepted pending his becoming qualified, that upon his return from service he spent five hours each

night for three weeks under the supervision of a dispatcher for the purpose of assuring that he could qualify as a dispatcher, and that on August 3, 1946, he commenced, and was still working, as a dispatcher.

He complained, however, that while he was in the Navy three other employees, with telegrapher seniority junior to his, were advanced to the position of dispatcher, the first of them, one Middlekauf, on June 3, 1945, and he asked that he be given seniority as a dispatcher ahead of them.

The petitioner answered, admitting many of the allegations of the complaint, but alleging that it had reinstated the respondent in the position and with the seniority which he held when he left its service, and that it was not possible to grant him seniority rights as a dispatcher dating from any date prior to August 3, 1946, for the reason that by so doing it would violate collective bargaining agreements, negotiated pursuant to the Railway Labor Act, with the Order of Railroad Telegraphers and the American Train Dispatchers' Association, by which latter agreement the seniority of its dispatchers was exclusively governed. The answer admitted that two of the three employees, who were advanced to dispatcher positions in his absence, had telegrapher seniority junior to the respondent's, but alleged that one of them, Knipp, had telegrapher seniority dating from December 13, 1916. The answer denied that the contract with the telegraphers or any usage gave the respondent the seniority as a dispatcher which he claimed.

The case was tried by the court without a jury (166). At the conclusion of the plaintiff's evidence, the petitioner moved for a dismissal for the reason that, upon the facts and the law, the respondent had shown no right to relief. This motion was overruled with the understanding that it might be reasserted at the conclusion of all the evidence (37, 166). It was so renewed and taken under advisement,

together with the entire cause (54, 166). The court submitted findings of fact, an opinion, conclusions of law, and a judgment to the effect that petitioner place the respondent's name on its seniority list of train dispatchers before the name of H. B. Middlekauf and assign him the seniority date thereon of June 3, 1945 (167-173).

An appeal was duly prosecuted to the Circuit Court of Appeals which affirmed the judgment of the District Court with an opinion appearing on page 186 of the record, a copy of which record, including all proceedings in the District Court and the Circuit Court of Appeals, is filed herewith under separate cover.

The Facts

The petitioner employs both train dispatchers and telegraphers, the former pursuant to an agreement between the petitioner and its train dispatchers as represented by the American Train Dispatchers' Association (139), and the latter pursuant to an agreement between the petitioner and its telegraphers, as represented by the Order of Railway Telegraphers (59). The duties of a train dispatcher and a telegrapher are distinct and different. A dispatcher issues the train orders; he supervises the movement of the trains; he is required to be constantly at his work, know the location of the trains, know the running times, and know the capabilities of the engine in regard to the loads and empties the engines can move in their trains. He determines and controls the time when every train on his territory shall pass a certain place or meet or pass other trains. He is required to exercise a great deal of judgment and discretion (53). The telegrapher works under the supervision of the train dispatcher. He operates the manual block system, copies train orders received from the dispatcher over the telephone or telegraph and delivers them to those in charge of the operation of the trains as directed by the dispatcher.

His duties are largely routine, without his being required to exercise any particular judgment or discretion (52, 53).

The petitioner maintained lists known as seniority rosters of both train dispatchers and telegraphers showing the respective seniority of both classes of employees. These were issued and furnished to train dispatchers and telegraphers on July 1st of each year (18, 113-137). Although the roster of dispatchers and the roster of telegraphers are issued at the same time and for convenience on the same form (49), they are entirely separate and distinct rosters. When a man hires as telegrapher, his name is placed on the seniority roster the day that he is first paid for that service (49). A dispatcher establishes his seniority on the date he is first paid for that service (43). Dispatchers who have been telegraphers retain their seniority as telegraphers after they become dispatchers. Such seniority appears on the telegraphers' seniority roster (113-137), which is separate and distinct from the dispatchers' roster.

Rule 20(a) of the agreement with the telegraphers provides that "When additional extra train dispatchers are needed, the positions will be advertised to all employees on the present telegraphers' seniority territory" (17, 70, 167). Pursuant to the provision quoted, when there is need of additional dispatchers, the company issues a bulletin to all telegraphers who are then in the telegraphers' seniority territory, the same being the Chicago Division between Cincinnati and the "K. D." office at Chicago (27, 28, 39, 40, 168). The positions are so "advertised" only when there is need of dispatchers, and it is stated in the advertisement that applicants will be expected to come to Peru and qualify immediately. The company sends advertisements (bulletins) to those who are on the seniority roster only when they are actually on the seniority territory. Telegraphers who are absent, on leave or furlough, or sick receive no such bulletins from the company (29, 39, 40).

After these advertisements or bulletins are sent out, the oldest telegraphers bidding on them are "assigned," which means that they are given an opportunity to take the necessary examinations and otherwise qualify, if they can, for promotion to the position of dispatcher. In other words, the opportunity to take the examination and to qualify is accorded to telegraphers who apply in the order of their seniority. There is nothing automatic in the promotion from telegrapher to dispatcher, that is, the oldest telegrapher who applies is not always appointed a dispatcher. The applicant must take an examination and qualify before he is entitled to promotion (28, 30, 40, 168). A Rules Committee, made up in part of men from other divisions of the system and having no particular knowledge of the physical situation on the Chicago Division, conducts an examination solely with reference to the Rules. If an applicant successfully passes the examination on the Rules, he is then required to go over the division for which he will dispatch trains to learn the physical characteristics of the railroad; he sits in with train dispatchers, under their supervision, and learns how to issue train orders, check trains, and the various other duties of a train dispatcher. This is called working on the sheet—a large sheet of paper on which the different trains are listed, together with their times at different stations (40, 41). If, after he has qualified on the Rules, has gone over the road, and has sat in on the sheet to learn the various duties, he convinces the Chief Dispatcher that he has the ability to do that type of work, he is permitted to work as a dispatcher the first time an additional dispatcher is needed. He thus establishes his seniority as dispatcher on the date he is first paid for that service (43).

In numerous instances senior men on the telegraphers' roster have applied and have been turned down, either by the Rules Committee or the Chief Dispatcher, and the position has been given to an employee who was qualified, notwithstanding the fact that such other employee was junior on the telegraphers' roster (34). If a telegrapher takes the examination and fails to pass the Rules examination, or fails to convince the Chief Dispatcher that he has the ability to do the work required of a dispatcher, he remains a telegrapher but may again at a later date put in his bid, take the examination, and attempt to qualify as dispatcher; however, in no case does he get on the dispatchers' seniority roster until he has so qualified (30, 31, 42, 43).

At the time of the promotion of each telegrapher who was promoted to the position of train dispatcher from and after July 1, 1942, there were respectively all the way from 22 to 144 telegraphers on the telegraphers' roster who had seniority thereon ahead of the telegraphers who were so promoted to dispatchers (42, 43, Defendant's Exhibit 3, 165).

A number of these telegraphers had attempted to qualify for promotion to the position of dispatcher but had failed to do so (41, Defendant's Exhibit 1, 163).

There were eight telegraphers who had taken the examination, attempted to qualify, and failed to do so but who had later successfully taken the examination and qualified and been promoted to the position of dispatcher (42, Defendant's Exhibit 2, 164).

Rule 5 of the agreement between the petitioner and the *dispatchers* provides as follows:

> (a) Seniority as dispatcher, will date from date employe passes the required examination and qualifies as dispatcher. Where more than one employe on a dispatcher's seniority territory is examined and qualifies as dispatcher on the same day, their seniority dates as

dispatcher will be in the order of seniority they held on the telegraphers' roster. Each employe examined as dispatcher, when qualified, will be given a certificate of qualification showing seniority standing.

(b) In filling vacancies in positions as dispatcher seniority shall be observed and the senior applicant will be given the position if he has the necessary ability (149, 168).

It will thus be seen that Rule 5 (a) relates to the manner in which an applicant may become a dispatcher—i.e., get his name on the roster of dispatchers; while Rule 5 (b) relates to the right, as between those on the dispatchers' roster, to bid in a particular job.

The respondent entered the employ of the petitioner as a telegrapher on January 12, 1940 and was given seniority as a telegrapher as of that date. He continued in such employment until he entered the military service on July 26, 1944. He continued in the military service until May 17, 1946, on which date he was honorably discharged. He was out of the country and in the Caroline and Marshall Islands in the South Pacific from April 27, 1945 until September 28, 1945. On June 7, 1946, he returned to the employ of the petitioner and assumed the duties of a telegrapher which he had left when he entered the military service (13, 14, 67). While respondent was yet in the service and stationed at Santa Ana, California, Owen E. Miller, the local Chairman of the Order of Railroad Telegraphers, acting as a personal friend of respondent, and not under any authorization by the company, mailed respondent a bulletin or advertisement for two extra train dispatchers and asked him to submit the bid to the Chief Dispatcher (14, 15, 168). It is the practice of the company to mail bids only to telegraphers who are on the territory, and, in instances other than that of the respondent, the company has refused bids of telegraphers

because they were not on the territory, but in the case of the respondent the company accepted the bid and permitted him to take the examination (29, 31, 168). He took the examination for the position of dispatcher on July 24, 1946 (14, 168) after having spent five hours each night for three weeks in learning the duties of a dispatcher, and he qualified and was promoted to the position of extra train dispatcher and assigned seniority as a dispatcher under and as of the date of August 3, 1946 (15, 57, 137, 168).

There were three occasions while respondent was in the service when a dispatcher's job was open in the territory. Respondent was then in the Marshall or Caroline Islands, and he was not notified of the vacancies (16, 168). The positions were filled by Middlekauf, Adkins, and Knipp. Middlekauf, with telegrapher seniority as of August 17, 1942, was promoted to the position of train dispatcher and assigned seniority as such as of June 3, 1945, and Adkins, with telegrapher seniority as of November 10, 1943, was promoted to the position of train dispatcher and assigned seniority as such as of August 25, 1945. Knipp, with telegrapher seniority as of December 13, 1916 (20, 21, 168), had been an extra dispatcher, possibly as early as 1926, and was still working as such when the respondent was first employed. He later resigned as train dispatcher, but subsequently bid again and was qualified and assigned the seniority date as a dispatcher as of May 16, 1946 (20, 21, 22, 48, 168). There came a time, however, while respondent was still in the Navy, when there was another vacancy, and Miller sent him the bid which he received while at Santa Ana. That was the vacancy which was held open for him until he came back and qualified for it, and was the one which he eventually filled (35, 36). Miller mailed no bids to any men other than the plaintiff who were in the armed forces (27).

The Jurisdiction

The Supreme Court has jurisdiction to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit pursuant to Title 28, Section 347 of the United States Code (Judicial Code, Section 240, amended).

The Question Presented

The question presented is as follows: Is a returning veteran, who has been restored to the identical position and seniority in a classification (craft) which he occupied at the time of his induction and has subsequently been promoted (transferred) to a higher classification (craft) as a result of his then demonstrating his qualifications by examination and trial, entitled by virtue of the Selective Training and Service Act of 1940, to seniority in such higher classification (craft) over those who, though junior to him in the lower classification (craft) have qualified for a promotion (transfer) to such higher classification (craft) and been promoted (transferred) to such higher classification (craft) in his absence, notwithstanding the fact that the collective bargaining agreement which creates and regulates seniority in such higher classification (craft) provides that seniority in such higher classification (craft) shall not commence until after the employee qualifies for promotion (transfer) to such higher classification (craft) by taking the required examination and demonstrating his ability to do the required work?

Reasons Relied on for Allowance of the Writ

Petitioner relies, for allowance of the writ, upon these reasons:

(a) The Circuit Court of Appeals has decided the Federal question presented and hereinabove stated in a way

which conflicts with applicable decisions of the Supreme Court. The decision of that question in the affirmative is in conflict with the decision of this Court in *Fishgold* v. *Sullivan Drydock & Repair Corporation*, 328 U. S. 275, in this:

(1) Such decision is to the effect that under the facts here appearing the Selective Training and Service Act of 1940, 54 Stat. 885, c. 720, 50 U. S. C. Appx. Sec. 301, grants to a returning veteran, not merely his former position, with like seniority, status and pay as he enjoyed at the time of his departure, but upon his subsequent promotion to a higher position, a step-up or gain in seniority over those who, though junior to him in the lower position, qualified for and thereupon were promoted to the higher position in his absence, notwithstanding the fact that his seniority, including that accumulated during his period of service, was not alone sufficient to entitle him to promotion ahead of them. This court has held in the *Fishgold* case that no such step-up or gain in priority can be fairly implied.

(2) Such decision is to the effect that, under the facts here appearing, the respondent shall be given seniority as a dispatcher as of June 3, 1945, notwithstanding the fact that he did not pass the examination and qualify for that position until August 3, 1946, thereby overriding an entirely valid collective bargaining agreement creating dispatcher seniority and providing that it shall date from the time when the employee passes the examination and qualifies. This Court has held in the *Fishgold* case that Congress did not seek to sweep aside the seniority system, but on the contrary recognized such systems and rights thereunder and undertook to give the veteran protection within their framework.

(b) The decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals on the same matter, namely:

The decision of the Circuit Court of Appeals for the Sixth Circuit in: *Raulins* v. *Memphis Union Station Co., et al.*, 168 F. 2d 466, and the decisions of the Circuit Court of Appeals for the Fifth Circuit in: *Rose* v. *Texas & N. O. R. Co.*, 171 F. 2d 458, and *Harvey* v. *Braniff*, 164 F. 2d 521. These decisions hold that under agreements and factual situations substantially identical with those in the instant case, that is, where promotion to a higher position is not a fixed right flowing from seniority alone, a returning veteran may not claim seniority in the higher position over those who, though junior to him in the lower position, have been promoted in his absence as a result of a demonstration of their qualifications.

(c) If the Court should conclude that the question, stated under the heading "The Question Presented" and decided by the Circuit Court of Appeals in the affirmative, has not been settled by this Court, it should be so settled, as it is a question of Federal law which is frequently arising and is of great importance to veterans, labor and management.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

By ALBERT H. COLE,
Counsel for Petitioner

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

The opinion of the District Court is reported in 75 F. Supp. 429, that of the Circuit Court of Appeals in 171 F. 2d 579. The opinions appear in the Record at pages 169 and 186 respectively.

II

Jurisdiction

The suit involves the construction of a federal statute, namely the Selective Training and Service Act of 1940, as amended, 50 U. S. C. A. App. § 301, et seq. and jurisdiction is here invoked pursuant to Title 28, Section 327 of the United States Code, Judicial Code, Section 240, amended.

III

Statement of the Case

A statement of the case having been made in the petition, in the interest of brevity it will not be here repeated.

IV

Specification of Errors

The error intended to be urged is the error of the District Court in its Conclusion of Law No. 2 and the judgment thereon rendered, the affirmance of that judgment by the Circuit Court of Appeals both resulting from the affirmative answer of those courts to the question stated under the heading "The Question Presented" in the foregoing petition.

Argument

(a)

(1) Respondent alleged that a contract between the petitioner and the Order of Railway Telegraphers, of which he was a member, conferred upon him fixed rights to promotion from the position of telegrapher to that of dispatcher in conformity with his seniority. The provision relied upon is of this tenor:

> "When additional train dispatchers are needed, the positions will be advertised to all employees on the present telegraphers' seniority territory."

This provision gave him no fixed right to promotion on the basis of his seniority. By its terms it did no more than to provide for notice of openings. He further alleged, however, that, by an established usage, all dispatchers were taken from the roster of telegraphers according to the highest seniority of telegraphers in petitioner's employ. There was not, and in the nature of things, could not have been, any such usage. The duties of the two positions are so divergent, and the discretion required to be exercised and responsibility required to be assumed by a dispatcher are so great that it never could be assumed that either innate ability or experience in the routine duties of a telegrapher could qualify him for the position of a dispatcher. As a matter of fact, many senior telegraphers continued as such when those junior to them were promoted to dispatcher and a considerable number of senior telegraphers sought promotion and failed to qualify. Some of them later successfully sought promotion, showing that from the mere fact of one's qualification at one time, it does not necessarily follow that he would have qualified at an earlier date.

The practice which prevailed was not in dispute. Pursuant to the provision we have quoted, notice of a vacancy

or opening in the position of dispatcher was given to telegraphers on the telegraphers' seniority territory. This did not include those who were absent, on leave or furlough, or sick. Those on the territory were given the right, in the order of their seniority, to submit to an examination on the rules. If they successfully passed the examination they underwent a period of trial training and if they satisfied the chief dispatcher as to their ability to do the work required of dispatchers they were "qualified" and received their promotion. Seniority as dispatcher dated from the date they passed the examination and qualified as dispatcher. Manifestly neither the contract nor the practice conferred seniority as a dispatcher upon the respondent prior to the date on which he qualified for that position.

There is nothing in the Selective Training and Service Act of 1940 which entitles him to seniority as of an earlier date. Section 8 (b) provided that he should be restored to the position which he left or to a position of like seniority, status and pay. He was a telegrapher when he entered the service and upon his return he was restored to the identical position which he left and with all of the seniority which he held when he went into the military service.

Nor does Section 8 (c) of the Act entitle him to the seniority which he claims. That section provides that a person who has been restored to his position in accordance with Section 8 (b) shall be considered as having been on furlough or leave of absence during his period of military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such

restoration. Respondent was restored to his former position without loss of seniority. He has been denied no participation in insurance or other benefits offered to employees on furlough or leave of absence. On the contrary he has been accorded preferential treatment in this respect. Those on furlough or leave of absence were not entitled to notice of vacancies in the position of dispatcher. While respondent was yet in the service, but expecting shortly to be discharged, petitioner accepted a bid which he submitted and held it open until after his return and then permitted him to be examined and qualify. In no other instance was such a privilege accorded to a telegrapher off the territory (29, 31). Respondent has not been discharged. There has accordingly been a full compliance with all applicable provisions of Section 8 (c).

While the Act is to be liberally construed in favor of returning veterans such construction does not contemplate that one who has been accorded every benefit which the act, by its terms, confers, shall, upon his subsequent promotion to a higher position, be given a step-up or gain in seniority over those who were promoted to the higher position during his absence, where promotion does not automatically flow from seniority alone, but is attained only if the applicant can demonstrate that he has both the ability and knowledge requisite for the higher position. Such in effect, is the holding of this court in the *Fishgold* case, where it is said:

> "As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed

services. We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more."

(2) The seniority of dispatchers is created and governed by the Dispatchers' Agreement, Rule 5 (a) of which provides that:

> "Seniority as dispatcher will date from date employe passes the required examination and qualifies as dispatcher. Where more than one employe on a dispatcher's seniority territory is examined and qualifies as dispatcher on the same day, their seniority dates as dispatchers will be in the order of seniority they held on the telegraphers' roster."

Under no circumstances is seniority as a dispatcher established by the telegraphers' agreement. The dispatchers' agreement, under which alone seniority as a dispatcher can be acquired, recognizes telegrapher seniority only in the single instance where more than one person qualifies as dispatcher on the same day.

Rule 5 (b) provides that:

> "In filling vacancies in positions as dispatcher seniority shall be observed and the senior applicant will be given the position if he has the necessary ability."

This provision has no reference to promotion from the position of telegrapher to that of dispatcher and the seniority thereby acquired. That matter is covered exclusively by Rule 5 (a). Rule 5 (b) relates exclusively to the filling of particular positions as dispatcher by those who have already

become dispatchers. For instance, if there is a vacancy in the position of dispatcher for a certain trick in the dispatchers' office in Peru, the applicant having the highest seniority as a dispatcher will be given the position if he has the necessary ability. Such seniority as a dispatcher is created and governed by the dispatchers' agreement providing that it will date from the date the employee passes the required examination and qualifies as a dispatcher. The granting to the respondent, who qualified on August 3, 1946, of seniority as of June 3, 1945 directly contravenes the very contract under which alone such seniority exists.

The contract in question is not in conflict with the Selective Training and Service Act, and it was not the intention of Congress to sweep aside such a seniority system as it created. Indeed, the intention of Congress was quite to the contrary. As was said by this court in the *Fishgold* case, 328 U. S. 275, 288 (May 27, 1946):

> "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year."

At the time of his induction the respondent's rights were governed solely by, and his seniority existed solely under the framework of, the telegraphers' contract. Upon his return he was restored to his former position with his seniority unimpaired. There was a complete compliance with the provisions of the Act so far as any rights under that contract were concerned.

He now seeks to be accorded rights under a different seniority system, which was created by a different contract, which had no connection with his own service at the time of his induction, and in direct violation of the seniority provisions of that contract. To permit this to be done would open the door for the courts "to sweep aside the seniority system." One instance of the chaotic condition which would result is shown in the instant case by the situation of Knipp. His telegrapher seniority dates from December 13, 1916. Middlekauf and Adkins, who became telegraphers in 1942 are both senior to him on the dispatchers' roster because they qualified as dispatcher before he did, and under the express provisions of the dispatchers' agreement their seniority dates from the date they passed the required examination and qualified as dispatcher. The District Court directed that the defendant place the respondent's name on the roster of dispatchers ahead of Middlekauf, which automatically gives him seniority ahead of Adkins and Knipp as well. We find, therefore, that, solely by reason of the court's adoption of respondent's contention that, as between respondent and Middlekauf and Adkins, seniority as dispatcher must conform to seniority as a telegrapher, he stands above Knipp on the dispatchers' roster although Knipp became a telegrapher more than twenty-three years before respondent did and qualified as a dispatcher some fourteen months before the respondent did. Such a situation sweeps aside the seniority system. The respondent is not entitled to have this done. He is entitled to protection within the framework of the seniority system, and this he has been given.

This court has not receded from the position taken in the Fishgold case but, on the contrary, has adhered to the principles therein announced in

Trailmobile Company, et al vs. Whirls, 331 U. S. 40 (April 14, 1947)

(b)

The decision of the court below in the instant case is in conflict with the decisions of every other Circuit Court of Appeals on the same matter.

Squarely in point is the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of Raulins vs. Memphis Union Station Company, 168 Fed. 2d 266 (June 1, 1948). Raulins and Rogers were employed by the defendant as electrician-helpers. They entered the Navy, were honorably discharged and reemployed as electrician-helpers. They were subsequently promoted to the position of electrician, one of higher wages and requiring a higher grade of technical ability than that of electrician-helper. While they were in the armed forces Turner and Black, junior to them as electrician-helpers, were promoted to the position of electrician and were retained in that position when Raulins and Rogers were later reduced to electrician-helpers. The alleged preferential employment of Turner and Black to the prejudice of Raulins and Rogers was the basis of the suits. The plaintiffs claimed that if they had remained in defendant's employ, instead of inducted into service, they would have received the promotion to electrician in preference to Turner and Black. They based their claims upon a collective bargaining agreement and upon an alleged custom of filling vacancies in the position of electrician by appointment of those having the highest seniority in the position of electrician helpers. Not only were the facts identical with those in the instant case, but the collective bargaining agreement embraced all that is here claimed to be spelled out both by contract and usage. It was there provided:

> "Rule No. 12. New Positions and Filling Vacancies.
> "(1) New jobs created or vacancies in respective crafts will be bulletined for five (5) days and the

> oldest employees in point of service shall, if sufficient ability is shown by fair trial, be given preference in filling such jobs or any vacancies that may be desirable to them, unless the Management and the Committee agree that the senior bidders are not qualified. • • •"

The Court held Raulins and Rogers were not entitled to relief. It said:

> "The Collective Bargaining Agreement does not make promotion from electrician-helper to electrician in case of vacancy an automatic one. It plainly provides application on the part of the electrician-helper, proof of his qualification for the promotion by actual trial, and for a return to his former position as electrician-helper with full seniority rights if he fails to qualify after a reasonable trial."

The plaintiffs relied upon certain statements of this court in the Fishgold case to the effect that one called to the colors was not to be penalized by reason of his absence from his civilian job, and that he does not step back on the seniority escalator at the point he stepped off but at the precise point he would have occupied had he kept his position continuously during the war. The court said:

> "We think it clear, however, that such expressions were dealing with the question of seniority, the veteran's retention of it while absent, and his increased seniority *through the passage of time* upon his return to his former position. No other rights were involved in that case. The expressions are not logically susceptible of the construction that the Act guaranteed to the veteran while in service any rights which he might possibly have been able to obtain, although by no means a certainty, if he had been working on the job instead of being in the service. The Court made this plain when it said, 'He is thus protected against receiving a job inferior to that which he had before entering the armed services,' and, 'As

we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence.' Our construction of the Act and of the ruling in *Fishgold* v. *Sullivan Drydock and Repair Corporation, supra,* is in accord with other decisions of the Federal courts." (Our emphasis.)

The court below attempted to distinguish the instant case from the Raulins case on the sole ground that in the latter case there was no "custom that electricians must come from the ranks of the electrician-helpers, because the evidence showed that two men who were not electrician-helpers were employed during the war as electricians." It will be noted from the opinion in the Raulins case that "Appellants do not complain of these employments, and do not ask for seniority rights ahead of them." Of course, their employment, if electrician-helpers bid for the jobs and demonstrated their qualifications, was a direct violation, not of a mere custom, but of an express provision of a written contract. It is of no particular consequence that there was no custom that electricians must come from the ranks of electrician-helpers, when there was an express contract to that effect, provided that any electrician-helper bid and proved himself qualified for the job. In view of the failure of the plaintiffs in the Raulins case to complain of the two men not previously employed, only one inference can be drawn. That is that at the time of the employment of these men no qualified electrician-helpers applied for the jobs and the employer was free to obtain electricians where it could. There is nothing in any contract or custom in the instant case which would have prevented the respondent, during the war, from hiring a dispatcher from outside the ranks of its own employees, if no telegrapher bid on the job and demonstrated his qualifications. No contract or custom would have required the respondent to do without the services of a needed dispatcher, nor employ in that respon-

sible position a man not qualified to perform its duties. It is true that it did not happen to occur that respondent was unable to fill vacancies in the position of dispatcher from the ranks of telegraphers, but it cannot be that Morris is entitled to seniority as a dispatcher above junior telegraphers who were promoted in his absence and that Raulins was not entitled to seniority as an electrician above junior electrician-helpers who were promoted in his absence, by reason of the mere fact that it chanced to happen that respondent, notwithstanding the man power shortage existing during the war, was able to fill the vacancies in the position of dispatcher from the ranks of its telegraphers while, on two occasions, the defendant in the Raulins case was obliged to go outside the ranks of electrician-helpers to find a properly qualified electrician. We submit that there is no real distinction between the Raulins case and the case at bar.

If, however, the distinction sought to be made by the court below is to prevail, that is, if the true rule is that, under a contract to the effect that promotion shall be made on the basis of seniority, provided the senior applicant demonstrates his ability and qualifications, a returning veteran may claim seniority over those junior to him in a lower classification but promoted therefrom in his absence, but that he shall forfeit his right under such contract if, in an isolated case, an applicant not previously employed in the lower classification received the promotion, either because no one therefrom applied, or because the contract in such instance was disregarded, that rule should be so announced by this court.

In accord with the decision in the Raulins case is the decision of the Circuit Court of Appeals for the Fifth Circuit in *Rose* v. *Texas & New Orleans Railroad Company*, 171 Fed. 2nd 458 (December 17, 1948). It will be noted that the contractual provision, set out in the margin, is in legal effect

substantially identical with the rule and practice here prevailing. The right to promotion, being based not on seniority alone, it was held that the plaintiff was not entitled to the promotion which he sought. The court predicated its decision in part on its own decision in *Harvey* v. *Braniff*, 164 Fed. 2nd 521 (December 4, 1947). That suit was brought by employees who were classified as co-pilots at the time of their induction. Soon after their discharge they were promoted to positions as first pilots. They asked that their base pay be figured as though they had actually been first pilots during their time of service. The contractual provision was again substantially identical with the contract and practice in the instant case. It was of this tenor:

> "Seniority shall govern all pilots in case of promotion and demotion, filling of vacancies, their retention in case of reduction in force, their re-employment after release due to reduction in force, their assignment or reassignment due to expansion or reduction in schedules and their choice of vacancies, provided that the pilot's professional qualifications are sufficient."

In the course of the opinion it was said:

> "In order to be promoted to the position of first pilot under the contract with appellee, their employer, co-pilots had to undergo severe tests and were required to fly a certain number of hours. Unless they could comply with the tests and pass them satisfactorily and comply with the number of hours, seniority did not entitle them to be advanced to the position of first pilot. Seniority merely gave them the right to take the tests.
>
> "Where an employee has no fixed or absolute right to promotion and where his right to promotion depends upon qualifications over and above mere length of service, the employer has fully complied with the terms of the Selective Training and Service Act when he restores the veteran to the same position or one of like seniority and pay which he held at the time of his induc-

tion into the service. In subsequently promoting the employee, the employer is not required to pay him more than the wages or salary attaching to his new rank at the time he assumes it."

The decisions of the Circuit Courts of Appeals which we have cited are supported by the following decisions of District Courts:

Bond v. *Tennessee Coal & Iron R. Company*, 73 F. Supp. 333 (July 9, 1947);

Harrison v. *Seaboard Airline R. Company*, 77 F. Supp. 55 (May 10, 1948).

We respectfully submit that the court was in error in its statement that the respondent's "Military service legally excused him from his failure to bid for the two vacancies filled while he was in service by two men who were junior to him on the telegraphers' seniority roster" and in its conclusion that he must thereby be deemed to have bid for the positions and successfully passed the examination and qualified at the time of the promotion of these men. This holding is in direct conflict with the decisions of the Circuit Courts of Appeals for the Sixth and Fifth Circuits to which we have referred. Manifestly if Morris was, by reason of his military service, legally excused from bidding and is to be deemed to have bid, passed the examination, and qualified at the time of the promotion of Middlekauf and Adkins, Raulins was for the same reason legally excused from bidding for the position of electrician at the time of the promotion of the junior electrician-helpers and must be deemed to have then shown sufficient ability by fair trial. Harvey and his fellow co-pilots were likewise legally excused by their military service from applying for positions as first pilots and must be deemed as having demonstrated that their professional qualifications were sufficient at such time

as there existed a vacancy not filled by a senior co-pilot and they were entitled to have their base pay figured as though they had actually been first pilots from that time. The courts, however, held otherwise.

(c)

It is petitioner's contention that the *Fishgold* case has settled in favor of its position the question presented in the instant case. If this Court should conclude otherwise, the petition should be granted to the end that such question should be settled by this Court. It is a question of federal law and one which by reason of its very nature and the wide prevalence of seniority systems in every field of industry has many times arisen. In view of the conflict between the decision of the Circuit Court of Appeals in the instant case and the decisions of other Circuit Courts of Appeals to which we have referred, veterans, labor organizations, and management cannot conceivably know the rights which they possess and the obligations which rest upon them.

It is, with great respect, submitted that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit should be reviewed and reversed.

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